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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 2015-UP-327 (S.C. Ct. App. filed 7/01/2015)
2012-GS-10-04289

THE STATE,

RESPONDENT,

V.

SHAWN J. BURRIS,

PETITIONER

APPELLATE CASE NO. 2013-001035

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Shawn Justin Burris, Appellant.

Appellate Case No. 2013-001035

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Unpublished Opinion No. 2015-UP-327
Submitted March 1, 2015 – Filed July 1, 2015

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General Deborah R.J. Shupe,
both of Columbia; and Solicitor Scarlett Anne Wilson, of
Charleston, for Respondent.

PER CURIAM: Shawn Justin Burris appeals his conviction for unlawful
obtaining of nonferrous metals, arguing the trial court erred in (1) denying his

motion for a directed verdict and (2) allowing the State's witness to testify as to the approximate monetary amount of damages to the property. We affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in denying Burris's motion for a directed verdict: *State v. Cherry*, 361 S.C. 588, 593, 606 S.E.2d 475, 477-78 (2004) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); *State v. McKnight*, 352 S.C. 635, 642, 576 S.E.2d 168, 172 (2003) ("On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State."); *State v. Weston*, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, [the appellate court] must find the case was properly submitted to the jury."); S.C. Code Ann. § 16-11-523(B) (Supp. 2014) ("It is unlawful for a person to wilfully and maliciously cut, mutilate, deface, or otherwise injure any personal or real property, including any fixtures or improvements, for the purpose of obtaining nonferrous metals in any amount."); S.C. Code Ann. § 16-11-523(A) (Supp. 2014) (defining "nonferrous metals" as "metals not containing significant quantities of iron or steel, including, but not limited to . . . copper pipe").

2. As to whether the trial court erred in allowing the State's witness to testify as to the approximate monetary amount of damages to the property: *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) (stating for an issue to be preserved for appeal, "The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity"); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) ("We review a trial court's decision regarding Rule 403[, SCRE,] pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment."); *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) ("Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one.").

AFFIRMED.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

SHORT, LOCKEMY, and McDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

SHAWN J. BURRIS,

APPELLANT

APPELLATE CASE NO. 2013-001035

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 2015-UP_327

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on July 1, 2015. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, Appellant submits the following:

On appeal, Burris raised two issues: (1) the trial court erred in denying Burris' motion for a directed verdict when the state did not prove beyond a reasonable doubt, by calling an expert to testify, that the alleged nonferrous metal piping was copper and did not contain a significant amount of iron as required by S.C. Code Section 16-11-523; (2) the trial court erred in allowing the state's

witness to testify as to the approximate dollar amount of the damages to the Bi-Lo refrigeration unit which was not an element required by S.C. Code Section 16-11-523 because the statute only required an amount of five thousand dollars or more.

On Issue One, the Court of Appeals cited State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) for the proposition that on a directed verdict, the trial court was concerned with the existence or nonexistence of evidence and not its weight. The Court then cited South Carolina Code Section 16-11-523 (B) that it was unlawful for a person to willfully and maliciously cut any property including fixtures or improvements, for the purpose of obtaining nonferrous metals. The Court also cited South Carolina code Section 16-11-523 (A) defining nonferrous metals as metals not containing significant quantities of iron or steel including copper pipe.

On Issue Two, the Court of Appeals held that the issue was not preserved for appeal by holding that the issue must have been raised and ruled on by the trial court, raised by the appellant in a timely manner and with sufficient specificity. The Court also addressed Rule 403, SCRE, that based on the abuse of discretion standard, it was required to give deference to the trial court's decision. Then the court cited State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), defining unfair prejudice as one having an undue tendency to suggest a decision on an improper basis as an emotional one.

The Court of Appeals misapprehended these issues.

On Issue One, the state simply did not prove the elements of the governing statute. In State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011), the Supreme Court held that the state presented insufficient evidence to submit the murder charge to the jury. The Court held that the trial court should have granted a directed verdict because the state's evidence only raised a "suspicion of guilt." Bostick was charged with the murder of his neighbor, who was an older woman. The

evidence against Bostick consisted of items (car keys, calculator) belonging to the victim which were found in the Bostick family's burn pile; the fire accelerant in the burn pile was one not used by Bostick's mother; Bostick had a pattern on his shoes that matched the accelerant which was gasoline; the blood found on Bostick's jeans did not match the victim's.

In State v. Attardo, 263 S.C. 546, 211 S.E.2d 868 (1975), the Supreme Court held that a basic principle of law is that the state has the burden of proof as to all of the essential elements of the crime. Citing State v. Paulk, 18 S.C. 514, (1883).

The state did not present evidence that the material contained only copper and not iron or steel or any other product. The evidence only raised a suspicion that the material was copper or nonferrous. The statute plainly states that nonferrous metal does not contain significant quantities of iron or steel. The state did not prove this required element of the statute beyond a reasonable doubt. The Bi-Lo store manager nor the police officers were qualified to say what the metal contained or the quantities of the ingredients in it. The state needed to present an expert who could have tested the pipe to determine its ingredients. The directed verdict should have been granted.

According to the law as provided in State v. Cherry, supra, and State v. Attardo, supra, the state has to prove the elements of the crime as stated in Indictment 2012-GS-100-4289 for the unlawful obtaining of non-ferrous metals pursuant to South Carolina Code Section 16-11-523 (B).

On Issue Two, the Court of Appeals disregarded the prejudice suffered by Burris when the judge and the state did not do as they promised to do pretrial. The Court ruled that the issue had to be raised and ruled on below. On ROA 22, ll. 22 – 24, Burris, who represented himself at trial, told the judge he was making a motion to “suppress any and all reference to the damage related to this case until sentencing.” The judge ruled on ROA 25, ll. 1-22, that the state could show damage but the amount would be presented if the jury found him guilty. On ROA 192, ll. 19 0 ROA 193, ll.

13, the state asked on redirect the amount of money damage. Burris objected on his prior motion that the money damage would not come in until sentencing. The judge overruled his objection.

South Carolina Code 16-11-523 (C) (2) provides:

A person who violates a provision of this section is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both, if the direct injury to the property, the amount of loss in value to the property, the amount of repairs necessary to return the property to its condition before the act, or the property loss, including fixtures or improvements, is five thousand dollars or more.

The state has the burden of proof as to all of the essential elements of the crime. State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010).

The specific amount of damage was not an element of the crime. The state told the court that the specific amount was not an element but was appropriate for sentencing. The judge told Burris that the state could allege an amount over or under \$5000 but the specific amount would be for sentencing. Then the judge allowed the state's witness to tell the jury the specific amounts of the damages for different repairs needed. This was prejudicial to Burris especially after he had not been convicted at that point.

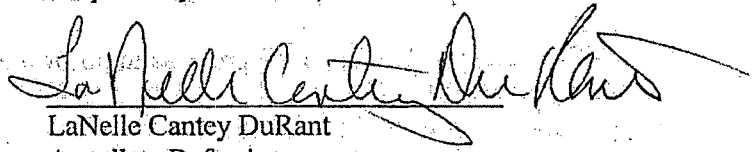
Rule 403, SCRE, provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The only evidence of monetary damages that the state should have been allowed to present to the jury was the fact that the amount was over \$5000 although any monetary amount should have been reserved for sentencing. Burris did not object to the indictment being read to the jury during arraignment where the indictment said \$10000 or more. The judge should not have allowed the state to go beyond that amount before a conviction. The amount of estimated damages of \$189000 was so

excessive to \$5000 as required by the statute, or the \$10000 as provided in the indictment that it was especially prejudicial to Burris.

WHEREFORE, we respectfully request this Court to reconsider its ruling, and remand Burris's case for a dismissal of the charges.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

This 16th day of July, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

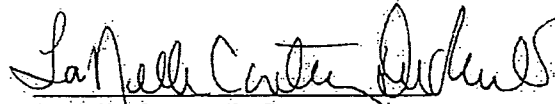
v.

SHAWN J. BURRIS,

APPELLANT

CERTIFICATE OF SERVICE

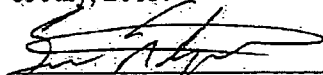
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Shawn J. Burris #191562, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 16th day of July, 2015.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 16th day
of July, 2015.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.

THE STATE OF SOUTH CAROLINA
 IN THE COURT OF APPEALS

Appeal From Charleston County
 The Honorable Kristi Lea Harrington, Circuit Court Judge
 Appellate Case No. 2013-001035

THE STATE,

Respondent,

v.

SHAWN J. BURRIS,

Appellant.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

Appellant contends the panel should reconsider its opinion affirming his convictions for unlawful obtaining of nonferrous metals and possession of tools of a crime, asserting the Court "misapprehended" the directed verdict and evidentiary issues he raised on appeal.¹ On the contrary, the Court was well aware of Appellant's assertions on both issues, and simply rejected them.

Appellant's directed verdict argument in the Petition for Rehearing is essentially the same argument he made in the Brief of Appellant - the State failed to prove the stolen pipes were nonferrous metals because it did not submit expert testimony. (Brief of Appellant, pp. 9-10). As discussed in the Brief of Respondent, however, the store

¹Appellant did not appeal the possession of tools of a crime conviction.

manager and police officers testified the pipes were copper pipes, which are included in the statutory definition of "nonferrous metals," and their testimony was undisputed. In denying Appellant's directed verdict motion, the circuit court specifically referenced that testimony. (Brief of Respondent, pp. 7-8). Viewed in the light most favorable to the State, and applying the appropriate standard of appellate review, there was sufficient evidence to submit the case to the jury, and this Court properly affirmed the circuit court on that issue.

Appellant also contends the Court "disregarded the prejudice suffered by [Appellant] when the judge and the state did not do as they promised to do pretrial," in connection with testimony regarding the amount of damages resulting from Appellant's actions. The Court found this issue was not preserved for appellate review. As argued in the Brief of Respondent, however, even if the issue was preserved, it was meritless.

During the pretrial discussion regarding evidence of specific damage amounts, the State indicated it did not intend to go into the specific amounts damages until sentencing, but did plan to prove some amount of damages as part of the *res gestae* of the offense. The circuit court ruled the State could present evidence the copper pipe was cut, mutilated or otherwise injured, which necessarily included some cost associated with the damage, but did not rule the specific damage amount was inadmissible. (R., pp. 22-25).

In keeping with the pretrial indication, the State did not elicit any testimony regarding the specific amount of damages during the store manager's direct examination, but merely asked the manager to describe the damages, the steps the store undertook to mitigate the damages, and the overall effect on the store, which the manager described as "catastrophic." On cross-examination, however, Appellant referenced "invoices" Bi-Lo's

loss prevention officers submitted to law enforcement that were purportedly used at Appellant's bond and preliminary hearings. After the manager testified some of the documents Appellant showed him related to a different store, Appellant asked why the documents were presented in the case against him, and the manager testified he did not know what invoices the loss prevention officers submitted. Appellant then asked questions about the dates work at the store occurred, clearly implying some of the work was not related to removal of the copper pipes. (R., pp. 177-192).

On re-direct, the State asked the manager about the dollar amount of damages to the store. Over Appellant's objection, the manager testified the damages were approximately \$189,000, and gave a list of things included in that amount. On re-cross, Appellant asked the manager if Bi-Lo was just trying to "make up for losses at other stores." (R., pp. 192-195).

By questioning the veracity of Bi-Lo's damages submissions, Appellant clearly attacked the store manager's credibility regarding the "catastrophic" damages sustained as a result of Appellant's actions. At a minimum, this tactic opened the door to testimony regarding the actual amount of damages, and what was included in it, to show the store manager's testimony regarding the "catastrophic" damages was credible and valid.

Appellant's implication the store fabricated the amount of damages changed the situation, the State had a right to elicit testimony in response, and Appellant cannot claim he was deceived in any way. In essence, Appellant claims "foul" while ignoring what actually occurred at trial.

Based on the foregoing and the arguments in the Brief of Respondent, Respondent State of South Carolina respectfully submits this Court properly affirmed the circuit

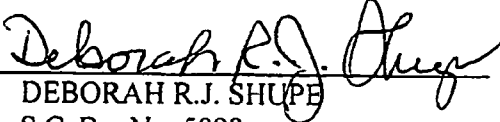
court's rulings on both issues presented. Accordingly, Appellant's Petition for Rehearing should be denied.

Respectfully Submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

SCARLETT A. WILSON
Solicitor, Seventh Judicial Circuit

By: 
DEBORAH R.J. SHUPE
S.C. Bar No. 5098

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July 24, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge
Appellate Case No. 2013-001035

THE STATE,

Respondent,

v.

SHAWN J. BURRIS,

Appellant.

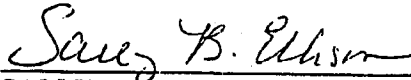
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Respondent's Return to Petition for Rehearing on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify all parties required by Rule to be served have been served.

This 24th day of July, 2015.


SALLY B. ELLSION
Legal Assistant

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The South Carolina Court of Appeals

The State, Respondent,

v.

Shawn Justin Burris, Appellant.

Appellate Case No. 2013-001035



ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Sparty J.

James C. Eady J.
Stephen P. McDonald J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Deborah R.J. Shupe, Esquire
Scarlett Anne Wilson, Esquire

FILED

August 20, 2015

LaNelle Cantey DuRant, Esquire
The Honorable Kristi Lea Harrington